No. 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

DOYLE SMITH, *Petitioner*,

v.

EVENING NEWS ASSOCIATION

On Writ of Certiorari To The Supreme Court
Of The State Of Michigan

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Supreme Court of Michigan (R. 23-36) has not yet been officially reported, but is unofficially reported in 106 N.W. 2d 785.

JURISDICTION

The opinion and order of the Supreme Court of Michigan were entered on January 9, 1961 (R. 23, 36). On April 7,

1961, Mr. Justice Stewart extended the time for filing petition for writ of certiorari to and including May 15, 1961 (R. 37). The petition was granted March 26, 1962 (R. 37-38). The jurisdiction of this Court rests on 28 U.S.C. § 1257(c).

STATUTES INVOLVED

The statutory provisions involved are Section 7, Section 8(a)(1), and portions of Section 8(a)(3), Section 10(a) and Section 10(c) of the National Labor Relations Act, as amended; and the first sentence of Section 203(d) and Section 301(a) of the Labor Management Relations Act, 1947, as amended; 61 Stat. 136 *ff.*, 29 U.S.C. §§ 141 *ff.* These provisions are:

"RIGHTS OF EMPLOYEES

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

"UNFAIR LABOR PRACTICES

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

• • • •

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment

to encourage or discourage membership in any labor organization. * * *."

"PREVENTION OF UNFAIR LABOR PRACTICES

"Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * *

"(c). * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

"FUNCTIONS OF THE SERVICE

"Sec. 203. (d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. * * *"

"SUITS BY AND AGAINST LABOR ORGANIZATIONS

"Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

QUESTION PRESENTED

Whether a suit for damages for breach of a collective bargaining agreement may be maintained in a state court, when the conduct constituting the breach of contract is also an unfair labor practice under the National Labor Relations Act.

STATEMENT

This is an action of assumpsit to recover damages for breach of contract, filed in the Circuit Court of Wayne County, Michigan (R. 2).

The second amended declaration alleged:

Plaintiff (petitioner here) and his forty-nine named assignors are and were employees of respondent, and are and were members of a labor organization, the Newspaper Guild of Detroit, hereinafter called the Guild (R. 3). The Guild and respondent entered into successive collective bargaining agreements, Article IV, Section 5, of which provided (R. 4):

> "5. There shall be no discrimination against any employee because of his membership or activity in the Guild."

While these agreements were in effect a group of respondent's employees belonging to a union other than the Guild went on strike (R. 4). During this strike respondent permitted employees in certain departments, who were not covered by any collective bargaining agreement, to report on the premises, and paid them full wages, even though there was no work available (R. 4-5). However, although petitioner and his assignors were ready to work during the strike, respondent allowed only a few of them to enter the premises, and as a result petitioner and his assignors lost considerable money in wages (R. 4). Respondent's refusal

to pay full wages to petitioner and his assignors during the strike, while paying full wages to other employees, was in violation of the contract provisions set forth above (R. 5).

Petitioner claimed damages in the amount of $20,000 (R. 5).

Respondent's answer denied certain of these allegations and asserted that "[t]he Court has no jurisdiction over the subject matter of this suit" (R. 7).

At the conclusion of the pre-trial hearing, the judge stated that this question of jurisdiction "should properly be disposed of first, before extensive testimony is taken" (R. 23). Accordingly, at the opening of the trial respondent moved to dismiss for lack of jurisdiction, on the following grounds (R. 11):

> "1. Defendant is charged with acts which, if true, constitute an unfair labor practice as defined in the National Labor Relations Act, as amended, and
>
> "2. The National Labor Relations Board has been vested by virtue of such amended Act with exclusive jurisdiction of the subject matter."

The parties stipulated that respondent, which publishes a newspaper, is engaged in commerce within the meaning of the National Labor Relations Act, as amended (R. 9, 23).

The trial court granted the motion to dismiss. Its opinion states (R. 10):

> "This Court, if it proceeded to a trial on the merits, would be required to determine whether or not plaintiff and his assignees were discriminated against, by reason of their Guild membership, when defendant employed on a full-time basis and paid its unorganized employees but did not do the same for all those employees who were Guild members. Such discrimination, if found to exist, would constitute an unfair labor practice under Section 8(a) of the National Labor Relations Act . . ."

After reviewing various decisions of this Court and of the lower courts on the issue of preemption, the trial court's opinion concludes (R. 19-20):

> "Finally, in order to allow recovery on the contract, this Court would be required to find discrimination of a kind which would also be an unfair labor practice and thus subject to correction by the National Labor Relations Board.
>
> "In view of the cases cited in this opinion, defendant's motion to dismiss for lack of jurisdiction should be granted."

The Supreme Court of Michigan affirmed. It held *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, to be controlling, and declared (R. 35):

> "Plaintiff may not characterize an act which constitutes an unfair labor practice as a contract violation and thereby circumvent the plain mandate of Congress —that jurisdiction of such matters be vested in the National Labor Relations Board and that Federal and State trial courts are without jurisdiction to redress by injunction or otherwise unfair labor practices. If the rule were otherwise, then Federal and State courts could assume jurisdiction over all types of unfair practices under the guise of enforcing the terms of the collective bargaining agreement, provided the agreement contains terms governing such matters, and thereby circumvent the plain mandate of Congress."

(The rationale of the state Supreme Court is further discussed *infra*).

SUMMARY OF ARGUMENT

The courts below held that the subject matter of this suit is within the exclusive jurisdiction of the National Labor Relations Board because the conduct alleged in the complaint as a violation of the collective bargaining agreement would also be an unfair labor practice under the

National Labor Relations Act. We submit that the courts below erred in so holding.

This Court held in a series of cases at the last Term that the preemption doctrines of such cases as *Garner* v. *Teamsters Union*, 346 U.S. 485, and *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, are not applicable to suits for breach of collective bargaining agreements. It further held, both explicitly and by necessary implication, that judicial jurisdiction over a suit for breach of a collective bargaining agreement is not ousted because the conduct alleged to constitute the breach may also be an unfair labor practice, or otherwise be arguably subject to § 7 and § 8 of the National Labor Relations Act. *Dowd Box Co.* v. *Courtney*, 368 U.S. 502; *RCA, Local Unions Nos. 128 and 633* v. *Lion Dry Goods*, 369 U.S. 17. See *In re Green*, 369 U.S. 689, 694 (opinion of Harlan, J., dissenting in part).

Assuming, arguendo, that the issue is still open, we submit that both the policies of the Labor Management Relations Act and the decisions of the NLRB support the jurisdiction of courts and arbitrators over issues of contract interpretation and violation, even though unfair labor practices within the jurisdiction of the NLRB may be directly or collaterally involved.

The Congress, in the enactment of the Labor Management Relations Act, undertook to implement three separate but interrelated policies: (1) Unions and employers are encouraged to provide for final and binding arbitration as the method for settling disputes over the application or interpretation of collective bargaining agreements. § 203(d). (2) Collective bargaining agreements are made legally binding as a matter of federal law, and federal remedies are provided for their enforcement in addition to those existing under state law. § 301. (3) Breach of a collective bargaining agreement as such is not an unfair

labor practice. Through these policies there runs the common thread of promoting industrial self-government. Employers and unions are encouraged, as a matter of federal labor relations policy, themselves to provide for the solution of disputes, either by arbitration or by contractual provisions enforceable in the courts, in lieu of leaving all disputes to adjudication by the NLRB or to a trial of economic strength.

These policies require, for a number of reasons, that courts and arbitrators have concurrent jurisdiction over issues of contract interpretation and violation, even though the activities giving rise to these issues are also, in the formula of *Garmon*, "arguably subject to § 7 or § 8 of the Act."

A large portion of the issues of contract interpretation and validity which are litigated and arbitrated, and particularly the latter, involve matters arguably subject to the Act. If all these issues were removed from judicial and arbitral jurisdiction, the policies of Congress to encourage arbitration, and to provide federal judicial remedies for breach of contract while preserving state remedies therefor, would be substantially frustrated. A large volume of cases would be added to the Board's load, and the policy, followed by the Board itself, of favoring arbitration of contractual issues would be upset.

In any event, it is not possible for courts and arbitrators, in every instance to segregate and renounce jurisdiction over all issues of contract interpretation and validity which involve questions arguably subject to the Act. Often these questions are inextricably intermingled with others. In other situations courts and arbitrators cannot, in ruling on issues of contract enforcement, avoid passing on the legal consequences of activities arguably subject to the Act, unless they are to create a no man's land.

The reverse is likewise true. Even though the Congress decided not to make breach of contract an unfair labor practice, and to leave contract enforcement "to the usual processes of the law" (H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. p. 41) the Board engages in a vast amount of contract interpretation.

There is, therefore, simply no way that courts and arbitrators can be excluded from considering in contract cases issues arguably subject to the Act, or that the Board can be excluded from considering a vast range of contractual issues.

Concurrent judicial and arbitral jurisdiction over contractual questions which involve issues arguably subject to the Act unquestionably will produce the "diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Garner* v. *Teamsters Union*, 346 U.S. 485, 490. However, such concurrent jurisdiction is not only unavoidable, but will augment existing possibilities for "diversities and conflicts" to only a minor degree.

Furthermore, under this Court's holdings in *Boys Markets* and *Lucas Flour*, "a single body of federal law" (369 U.S. at 104) will govern the interpretation of collective bargaining agreements no less than the interpretation of the Act. Conflicting interpretations of the Act and of collective bargaining agreements which will result from concurrent jurisdiction can, therefore, be resolved by this Court.

ARGUMENT

The courts below held that the subject matter of this suit is within the exclusive jurisdiction of the National Labor Relations Board because the conduct alleged in the complaint as a violation of the collective bargaining agreement would also be an unfair labor practice under the National

Labor Relations Act. We submit that the courts below erred in so holding.

While the question was still an open one when the courts below rendered their decisions, this Court has now held, we submit, that the jurisdiction of the courts, whether state or federal, over suits for violation of collective bargaining agreements is not ousted because the activities asserted to constitute the contract violation are also arguably subject to § 7 and § 8 of the National Labor Relations Act. This position is in line with the position to which the NLRB has, in general, adhered over the years, and with the policies of the Labor Management Relations Act. The weight of authority in the lower courts likewise supports concurrent judicial and arbitral jurisdiction.

I

This Court Has Held That The Courts Have Jurisdiction Over A Suit For Breach Of A Collective Bargaining Agreement, Even Through The Conduct Constituting The Breach May Also Be An Unfair Labor Practice.

In holding that this suit is within the exclusive jurisdiction of the National Labor Relations Board, and that the state courts therefore lack jurisdiction over the subject matter of the suit, the Supreme Court of Michigan relied primarily on (R. 27-35) this Court's decision in *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (second decision). It quoted, *inter alia*, this Court's statement in *Garmon* (p. 245; R. 29):

> "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

And, after a lengthy review of Justice Harlan's concurring opinion in *Garmon*, the Supreme Court of Michigan concluded (R. 35-36):

> "Since it is, to say the least, fairly debatable whether the conduct here involved is federally protected, then under both the majority and concurring opinions of *Garmon*, the judgment of the trial court must be affirmed."

It is evident that the state Supreme Court was utterly confused: no one had suggested that respondent's conduct was "federally protected."[1] Rather, both parties agreed that the conduct alleged was federally prohibited: the question, as the Michigan court elsewhere correctly stated, was (R. 25):

> "Does a State court have jurisdiction of an action at law by an employee against his employer for breach of a contract between such employer and a labor organization to which such employee belongs where the action is based upon facts which if true would constitute both a breach of such contract and an unfair labor practice under the provisions of section 8(a) of the National Labor Relations Act as amended?"

At the time the court below handed down its decision it was possible to say, in the language of Judge Magruder in *United Electrical Workers, Local 259* v. *Worthington Corp.*, 236 F. 2d 364, 367 (1st Cir. 1956):

> "There has not yet been a Supreme Court decision involving the jurisdiction of a court or arbitrator over

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[1] The natural assumption would be that when the Court said "federally protected" it meant "federally prohibited." However, the Court's lengthy review of and reliance on the concurring opinion in *Garmon*, which rested its view that there was preemption on the "narrow ground" that the activities involved "may fairly be considered protected" under the federal Act (359 U.S. at 249), seems to rule out this explanation.

> acts constituting a contract violation as well as an unfair labor practice."

We submit, however, that this issue was disposed of in favor of concurrent jurisdiction in a series of cases decided by the Court at the last Term, beginning with *Dowd Box Co.* v. *Courtney*, 368 U.S. 502.

In *Dowd Box* suit was brought in a state court in Massachusetts by local union officers as representatives of the membership of the local. Shortly before the expiration of a collective bargaining agreement representatives of the local union and of the company had agreed in negotiations to certain changes in the agreement, including a wage increase. These changes were embodied in a "stipulation" which was signed by the representatives of each party. The company initially announced that it would put the changes into effect, but later repudiated the "stipulation" on the ground that "its bargaining representatives has acted without authority." 368 U.S. at 504. The complaint asked for an order declaring the contract valid and enjoining the company from violating it, and for an accounting and damages.

The company urged that the jurisdiction of the federal courts under § 301(a) of the Labor Management Relations Act was exclusive, and that the state court therefore had no jurisdiction over the controversy. The state court held that it had jurisdiction, ruled that the collective bargaining agreement was valid and binding, and entered a money judgment in conformity with the agreed to wage increase. The Supreme Court of Massachusetts affirmed.

This Court likewise affirmed. It said (368 U.S. at 508-509):

> "The legislative history makes clear that the basic purpose of § 301(a) was not to limit, but to expand, the

> availability of forums for the enforcement of contracts made by labor organizations. Moreover, there is explicit evidence that Congress expressly intended not to encroach upon the existing jurisdiction of the state courts."

The Court went on to point out that the considerations which had led it to find federal preemption in such cases as *Garner* were not applicable to suits for breach of collective bargaining agreements. After quoting the well-known passage in *Garner* v. *Teamsters Union*, 346 U.S. 485, 490, to the effect that Congress did not merely lay down a substantive law of labor relations, but confided "primary interpretation" to a specially constituted tribunal, i.e., the NLRB, this Court said (368 U.S. at 513):

> "By contrast, Congress expressly rejected that policy with respect to violations of collective bargaining agreements by rejecting the proposal that such violations be made unfair labor practices. Instead, Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law.'"

While the Court did not specifically advert to the point, it can hardly have escaped its attention that the conduct of the company, which the state courts held constituted a breach of conduct, was also, in the language of *Garmon*, "an activity * * * arguably subject to § 7 or § 8 of the Act," i.e., a refusal to bargain collectively. Indeed, the company called attention to that aspect of the case. It argued (Petitioner's brief, pp. 21-26), that even if federal court jurisdiction under § 301 were not exclusive in every case, it should be exclusive where, as in the case at hand, the alleged breach of contract was also an unfair labor practice. In reply the union did not deny that the company's conduct was arguably an unfair labor practice, but simply urged (p. 16*ff.*), as this Court ultimately held, that the considerations which had led the Court to find preemption in

such cases as *Garner* and *Garmon* were inapplicable to suits for breach of collective bargaining agreements.

The week following *Dowd Box* the Court decided *RCIA, Local Unions Nos. 128 and 633* v. *Lion Dry Goods*, 369 U.S. 17. In that case the unions sued under § 301 to compel the employer to comply with two arbitration awards which had been rendered under a strike settlement agreement. The question at issue, which was decided by this Court in the affirmative, was whether the settlement agreement was a collective bargaining agreement within the meaning of § 301. Here again, however, it can hardly have escaped the Court's attention that the arbitration awards involved issues "arguably subject to § 7 or § 8 of the Act," i.e., the reinstatement of strikers and the unions' "right of access to the employees' cafeteria in order to communicate with employees during their non-work time." (369 U.S. at 23).

The next case decided by the Court, *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95, involved a different type of situation. In that case the collective bargaining agreement recognized the right of the company to discharge any employee whose work was unsatisfactory, and provided for final and binding arbitration, but did not contain a no-strike clause. The company fired an employee for unsatisfactory work and the union went on strike. Ultimately, after the strike had ended, the discharge was submitted to a Board of Arbitration which decided in favor of the company.

The employer brought suit in a Washington state court for damages for losses caused by the strike, and a judgment in its favor was affirmed by the state Supreme Court. 57 Wash. 2d 95, 356 P. 2d 1. The state Supreme Court rejected the contention of the unions that the NLRB had exclusive jurisdiction over the controversy. It held that *Garmon* was not applicable because the activities involved did not, in its

view, fall within the purview of § 7 or § 8 and because, in any event, it thought preemption not applicable to a suit for damages for breach of a collective bargaining agreement. The court likewise rejected the contention that the federal courts had exclusive jurisdiction under § 301(a). On the merits the court held that the question whether the strike was in violation of the contract was controlled by state and not federal law, and that under state law the strike was in violation of the contract.

This Court affirmed. It said (369 U.S. at 101):

> "One of those issues [which this case presents]—whether §301(a) of the Labor Management Relations Act of 1947 deprives state courts of jurisdiction over litigation such as this—we have decided this Term in *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502. For the reasons stated in our opinion in that case, we hold that the Washington Supreme Court was correct in ruling that it had jurisdiction over this controversy."

At this point the Court appended a footnote, which reads:

> "Since this was a suit for violation of a collective bargaining contract within the purview of § 301(a) of the Labor Management Relations Act of 1947, the pre-emptive doctrine of cases such as *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, based upon the exclusive jurisdiction of the National Labor Relations Board, is not relevant. See *Local 4264, United Steelworkers* v. *New Park Mining Co.*, 273 F. 2d 352 (C. A. 10th Cir.); *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F. 2d 401 (C. A. 3d Cir.); see generally *Lodge No. 12, District No. 37, Int'l Assn. of Machinists* v. *Cameron Iron Works, Inc.*, 257 F. 2d 407 (C. A. 5th Cir.); *Local 598, Plumbers & Steamfitters Union* v. *Dillion*, 255 F. 2d 820 (C. A. 9th Cir.); *Local 181, Int'l Union of Operating Engineers* v. *Dahlem Constr. Co.*, 193 F. 2d 470 (C. A. 6th Cir.). As pointed out in *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. at . Congress 'deliberately chose to leave

the enforcement of collective agreements "to the usual processes of the law." See also H. Conf. Rep. No. 510, 80th Cong., 1st Sess. p. 52. It is, of course true that conduct which is a violation of a contractual obligation may also be conduct constituting an unfair labor practice, and what has been said is not to imply that enforcement by a court of a contract obligation affects the jurisdiction of the N.L.R.B. to remedy unfair labor practices, as such. See generally Dunau, Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems, 57 Col. L. Rev. 52."

The Courts of Appeals decisions cited by the Court in this footnote represent the prevailing view among the lower courts that courts and arbitrators have jurisdiction over "conduct which is a violation of a contractual obligation" even though it "may also be conduct constituting an unfair labor practice."[2]

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[2] Upholding jurisdiction: *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F. 2d 401 (3d Cir. 1956) (suit for specific enforcement of agreement to negotiate; cited in *Lucas Flour*, n.9); *Textile Workers* v. *Arista Mills Co.*, 193 F. 2d 529, 533-534 (4th Cir. 1951) (suit for specific enforcement of contract and damages); *Lodge 12, Machinists* v. *Cameron Iron Works, Inc.*, 257 F. 2d 405 (5th Cir. 1958), *cert. denied*, 358 U.S. 880 (suit to compel arbitration; cited in *Lucas Flour*, n.9); *Operating Engineers, Local 715* v. *Gulf Oil Corp.*, 262 F. 2d 80 (5th Cir. 1958), *cert. denied*, 359 U.S. 992 (suit to compel arbitration); *Operating Engineers, Local 181* v. *Dahlem Constr. Co.*, 193 F. 2d 470 (6th Cir. 1951) (suit for damages; cited in *Lucas Flour*, n.9); *Modine Mfg. Co.* v. *Machinists*, 216 F. 2d 326 (6th Cir. 1954) (suit for declaratory judgment and damages); *Local 598, Plumbers & Steamfitters Union* v. *Dillion*, 255 F. 2d 820 (9th Cir. 1958) (suit for damages; cited in *Lucas Flour*, n.9); *Local 4264, United Steelworkers* v. *New Park Mining Co.*, 273 F. 2d 352, 357-358 (10th Cir. 1959) (suit to compel arbitration, for declaratory judgment and for damages; cited in *Lucas Flour*, n.9); *Local 1055 IBEW* v. *Gulf Power Co.*, 175 F. Supp. 315 (N.D. Fla. 1959) (suit to compel arbitration); *Ryan Aeronautical Co.* v. *UAW, Local 506*, 179 F. Supp. 1 (S.D. Cal. 1959) (suit to enjoin enforcement of arbitration award);

Local 410, RCIA v. *Sears Roebuck & Co.*, 185 F. Supp. 558 (N.D. Cal. 1960) (suit to compel arbitration); *Ludlow Mfg. & Sales Co.* v. *Textile Workers*, 108 F. Supp. 45 (D. Del. 1952) (suit for damages); *Brady Transfer & Storage Co.* v. *Local 710, Meat Drivers*, 30 LRRM 2535, 22 LC ¶67,121 (N.D. Ill. 1952) (suit for damages); *Employing Plasterer's Assn.* v. *Plasterers Union*, 186 F. Supp. 91 (N.D. Ill. 1959) (suit for declaratory judgment); *Reed* v. *Fawick Airflex Co.*, 86 F. Supp. 822 (N.D. Ohio 1949) (suit for damages); *Gremio de Prensa* v. *Voice of Puerto Rico*, 121 F. Supp. 63 (D. P.R. 1954) (suit for damages); *Local 28, IBEW* v. *Md. Chapter, NECA*, 48 LRRM 2031, 42 LC ¶ 16,946 (D. Md. 1961) (suit for declaratory judgment); *Carey* v. *General Electric Co.*, 50 LRRM 2119 (S.D.N.Y., April 19, 1962) (suit to compel arbitration); *Grunwald-Marx, Inc.* v. *Clothing Workers*, 52 Cal. 2d 568, 343 P. 2d 23 (1959) (suit to confirm arbitration award); *A. L. Gage Plumbing Supply Co.* v. *Local 300, Hod Carriers*, 50 LRRM 2114 (Cal. App. 1962) (suit for injunction and damages, decided on authority of *Dowd Box* and *Lucas Flour*; *Aaronson Bros. Paper Corp.* v. *Fishko*, 144 N.Y.S. 2d 643 (N.Y. Sup. Ct. 1955), *aff'd*, 286 App. Div. 1009 (suit to stay arbitration); *In re Columbia Broadcasting System*, 205 N.Y.S. 2d 85 (N.Y. Sup. Ct. 1960) (suit to stay arbitration); *Ohio Valley Builders Exchange, Inc.* v. *Carpenters*, 50 LRRM 2572 (Ohio Ct. Com. Pleas, 1962) (suit to enjoin breach of contract).

Contra: United Elec. Workers v. *General Elec. Co.*, 231 F. 2d 259 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 872 (suit for declaratory judgment); *Plumbers Union, Locals 169 and 741* v. *Marchese*, 81 Ariz. 182, 302 P. 2d 930 (1956), *rehearing denied*, 82 Ariz. 30, 307 P. 2d 1038 (1957) (suit to enjoin breach of contract); *Industrial Workers, Local 286* v. *Star Products Co.*, 41 LRRM 2840 (Ill. App. 1958) (suit for declaratory judgment as a validity of contract); *Local 774, IAM* v. *Cessna Aircraft Co.*, 341 P. 2d 989 (Kan. Sup. Ct. 1959) (suit to compel arbitration); *McAmis* v. *Panhandle Eastern Pipe Line Co.*, 273 S.W. 2d 789 (Mo. App. 1954) (suit to enforce arbitration award); *Local 502, Hod Carriers* v. *Park Arlington Corp.*, 50 LRRM 2108, 44 LC ¶ 17,578 (N.J. Sup. Ct. 1962) (suit to enjoin breach of contract and for damages; decision below in present case relied on).

Discussing the issue and reserving decision: *United Electrical Workers Local 259* v. *Worthington Corp.*, 236 F. 2d 364 (1st Cir. 1956); *Local 1505, IBEW* v. *Lodge 1836, IAM*, 50 LRRM 2337 (1st Cir., June 4, 1962); *Post Publishing Co.* v. *Cort*, 334 Mass. 199, 134 N.E. 2d 431 (1956).

The Court then went on to hold that the question whether the strike was in violation of the contract was controlled by federal and not by state law, and that as a matter of federal law the strike was in violation of the contract. On this last point the Court noted that several Courts of Appeals and the NLRB had held that a strike over a dispute which the collective bargaining agreement provided should be settled by arbitration, was a violation of the agreement, and said, "We approve that doctrine."

Lucas Flour differs from *Dowd Box*, *Lion Dry Goods*, and the present case, in that conduct there held to constitute a breach of contract, that is, the strike, did not also constitute an unfair labor practice. However, if the union had prevailed on its contention that the strike was not in violation of the contract, then the strike would, at least arguably, have been protected under the Act. Thus the strike was, in the formula of *Garmon*, "an activity • • • arguably subject to § 7 or § 8 of the Act." And the Court did not, in holding that (n. 9) "the preemptive doctrine of cases such as" *Garmon* "is not relevant" in suits for breach of a collective bargaining agreement, draw any distinction between conduct arguably prohibited by the Act and conduct arguably protected.

This aspect of *Lucas Flour* is dealt with in the dissenting opinion, though not in the opinion of the Court, in *In re Green*, 369 U.S. 689. In that case an employer obtained *ex parte* from a trial court in Ohio a temporary restraining order against picketing. Green, as attorney for the union, took the position that the dispute was within the exclusive jurisdiction of the NLRB, and advised that the restraining order be ignored. It appears that the employer contended that the picketing was in violation of a collective bargaining agreement, while the union contended that the agreement

had been signed by unauthorized agents. The union filed with the NLRB a charge of refusal to bargain, which had not been acted on at the time of the injunction.

The trial court held Green in contempt, and the state Supreme Court affirmed. Neither of the Ohio courts passed on the issue of preemption: they held Green in contempt under the doctrine of *United States* v. *United Mine Workers*, 330 U.S. 258.

This Court reversed. It said that the trial court was without power to hold Green in contempt if it lacked jurisdiction to issue the restraining order by reason of federal preemption, and that it violated due process by holding Green in contempt without according him a hearing on the issue of preemption. Like the Ohio courts, this Court did not pass on the issue of preemption, stating that it was impossible to determine it on the record.

Justice Harlan and Clark dissented in part. They said that the claim of the state court to jurisdiction was not frivolous, and added (369 U.S. at 694):

> "*Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95, 104, makes clear that the rule stated in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245, ousting state courts from dealing in tort with activities even arguably subject to §§ 7 or 8 of the National Labor Relations Act, does not apply when relief is sought for breach of an alleged collective bargaining agreement. State jurisdiction was upheld in *Lucas Flour*, although the activity there would have been protected by § 7 if not forbidden by a contract provision whose interpretation was fairly disputed, and thus was still arguably protected."

The latest opinion of the Court in this field is *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238. Like *Lucas Flour*, that was a suit by an employer for damages for alleged breaches

of a no-strike clause. The union urged (Brief 65-72) that the work stoppages, even if in violation of the contract, were arguably protected activity under the decision of this Court in *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, and that the NLRB therefore had exclusive primary jurisdiction under the *Garmon* decision (Brief 65-72). The Court disposed of this contention in a footnote, which reads:

> "* * The Union also argues that the preemptive doctrine of such cases as *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, is applicable and prevents the courts from asserting jurisdiction. Since this is a § 301 suit, that doctrine is inapplicable. *Local 174* v. *Lucas Flour Co.*, 369 U.S. 95, 101 n. 9."

We submit that these decisions of the Court at the 1961 Term require reversal of the decision below in the present case. In two of the cases, *Dowd Box* and *Lion Dry Goods*, the conduct alleged as a breach of contract also constituted, at least arguably, an unfair labor practice, just as in the present case, and that factor was called to the Court's attention in *Dowd Box*. In two other cases, *Lucas Flour* and *Atkinson* v. *Sinclair Refining Co.*, on the other hand, no unfair labor practice was involved, but it was urged as a defense that the conduct alleged as a breach of contract was federally protected, and that the NLRB therefore had exclusive primary jurisdiction. However, the Court upheld the jurisdiction of the courts in all four cases. In such cases as *Garmon* and *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, the Court, in holding that there was federal preemption, had drawn no distinction between cases involving conduct asserted to be prohibited by the Act and those involving conduct asserted to be protected; and in these four cases at the last Term the Court likewise drew no such distinction in holding the preemption doctrines of earlier decisions inapplicable in breach of contract suits.

These cases appear to us to dispose of the present case. In a recent address analyzing this Court's decisions at the last Term dealing with § 301, William Feldesman, Solicitor of the NLRB, said:

> "From this statement by the Court [*i.e.*, *Lucas Flour*, n.9] we learn generally, and I use that word advisedly, that the Board's exclusive jurisdiction will not attach under principles of pre-emption when suits cognizable under 301 are instituted for violation of collective bargaining contracts. And we also derive from this language the rule that where conduct that is a breach of a contractual obligation may also be an unfair labor practice, relief granted by a Federal or State court under 301 does not affect the Board's jurisdiction to remedy the unfair labor practice. The Courts and the Board have concurrent jurisdiction." (Feldesman, Section 301 and the National Labor Relations Act, Daily Labor Report, June 7, 1962, p. E-1; excerpted 50 LRRM 158.)

However, the Court granted the petition for certiorari in the present case subsequent to its decisions in *Dowd Box* and *Lucas Flour*, and, instead of reversing *per curiam*, invited the Solicitor General to file a brief (R. 37-38). We shall, therefore, assume, arguendo, that the issue is still open, and will undertake to demonstrate that both the policies of the Labor Management Relations Act and the decisions of the NLRB support the jurisdiction of courts and arbitrators over issues of contract interpretation and violation, even though unfair labor practices within the jurisdiction of the NLRB may be directly or collaterally involved.

In *A. I. Gage Plumbing Supply Co. v. Local 300, Hod Carriers*, 50 LRRM 2114 (1962), a California District Court of Appeals ruled that in *Dowd Box* and *Lucas Flour* this Court "expressly upheld" the concurrent jurisdiction of the courts over breach of contract actions, even though the conduct alleged to constitute the breach of contract might also be an unfair labor practice.

II

The Policies Of The Labor Management Relations Act And Of The NLRB Support The Jurisdiction Of Courts And Arbitrators Over Contract Issues That Also Involve Unfair Labor Practices.

Congress declared, in § 203(d) of the Act:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

By § 301(a) of the Act Congress conferred on the federal district courts jurisdiction over suits for violation of contracts between an employer and a union, without regard to the amount in controversy or diversity of citizenship. Section 301(b) provides that a labor union may sue or be sued as an entity.

Thus the Congress adopted the policy of encouraging the settlement of disputes by final and binding arbitration pursuant to voluntary agreement of the parties. As this Court declared in *United Steelworkers of America* v. *Warrior & Gulf N. Co.*, 363 U.S. 574, 578:

> "A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."

At the same time Congress made collective bargaining agreements "equally binding and enforceable on both parties." S. Rep. No. 105, 80th Cong., 1st Sess. p. 15; see *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 452 *ff*.

The bills passed by the House and the Senate both also contained provisions making violation of a collective bargaining agreement an unfair labor practice. S. Rep. *supra* pp. 20-21; H.R. Rep. No. 245, 80th Cong., 1st Sess. p. 21.

However, these provisions were dropped in conference, the House Conference Report stating (H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. p. 42):

> "Once parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board."

This legislative history is summarized in *Lincoln Mills*, 353 U.S. at 455-456; and *Dowd Box*, 368 U.S. at 508-513.

One further item of legislative history appears to be pertinent. The first sentence of § 10(a) of the National Labor Relations Act, which Taft-Hartley carried over without change from the Wagner Act, provides:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce."

In the Wagner Act, the succeeding sentence read:

> "This power shall be exclusive, and shall not be affected by any other means of adjustment or provision that has been or may be established by agreement, code, law, or otherwise: * * *"

The Taft-Hartley Act eliminated from this sentence the words "shall be exclusive and" (and also the word "code"). The House Conference Report gives the following explanation:

> "The Senate amendment, because of its provisions authorizing temporary injunctions enjoining alleged unfair labor practices and because of its provisions making unions suable, omitted the language giving the Board exclusive jurisdiction of unfair labor practices, but retained that which provides that the Board's

> power shall not be affected by other means of adjustment or prevention. The conference agreement adopts the provisions of the Senate amendment. By retaining the language which provides the Board's powers under section 10 shall not be affected by other means of adjustment, the conference agreement makes clear that, *when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies.*" H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. p. 52. (Italics added.)

The reference to "provisions making unions suable" must refer primarily to § 301. It appears, accordingly, that the conferees specifically contemplated that the jurisdiction of the courts over contract suits under § 301 would overlap the jurisdiction of the Board to prevent unfair labor practices, and intended that the Board and the courts should have concurrent jurisdiction. See Note, Jurisdiction of Arbitrators and State Courts Over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice, 69 Harv. L. Rev. 725, 729 (1956).

Thus the Congress, in the enactment of the Labor Management Relations Act, undertook to implement three separate but interrelated policies: (1) Unions and employers are encouraged to provide for final and binding arbitration as the method for settling disputes over the application or interpretation of collective bargaining agreements. (2) Collective bargaining agreements are made legally binding as a matter of federal law, and federal remedies are provided for their enforcement in addition to those existing under state law. (3) Breach of a collective bargaining agreement as such is not an unfair labor practice. Through these policies there runs the common thread of promoting industrial self-government. Employers and unions are en-

couraged, as a matter of federal labor relations policy, themselves to provide for the solution of disputes, either by arbitration or by contractual provisions enforceable in the courts, in lieu of leaving all disputes to adjudication by the NLRB or to a trial of economic strength.

These policies require that courts and arbitrators have concurrent jurisdiction over issues of contract interpretation and violation, even though the activities giving rise to these issues are also, in the formula of *Garmon*, "arguably subject to § 7 or § 8 of the Act." This is so for a number of reasons, some positive and some negative, which may be summarized as follows:[1]

A large portion of the issues of contract interpretation and validity which are litigated and arbitrated, and particularly the latter, involve matters arguably subject to the Act.[2] If all these isues were removed from judicial and arbitral jurisdiction, the policies of Congress to encourage arbitration, and to provide federal judicial remedies for breach of contract while preserving state remedies therefor, would be substantially frustrated. A large volume of cases

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[1] All of these points are fully developed in Dunau, Contractual Prohibitions of Unfair Labor Practices: Jurisdictional Problems, 57 Col. L. Rev. 52 (1957). This article was cited by the Court in *Lucas Flour*, n.9. See also Note, Jurisdiction of Arbitrators and State Courts Over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice, 69 Harv. L. Rev. 725, 727 (1956); Meltzer, The Supreme Court, Congress, and State Jurisdiction over Labor Relations: II, 59 Col. L. Rev. 269, 281-301 (1959); Note, 59 Col. L. Rev. 153, 168-171 (1959).

[2] "* * * [A]rbitrators uniformly reject the argument that the NLRA prevents them from exercising jurisdiction * * *." Note *op. cit. supra*, 69 Harv. L. Rev. at 728

would be added to the Board's load,[a] and the policy, followed by the Board itself, of favoring arbitration of contractual issues, would be upset.

In any event, it is not possible for courts and arbitrators in every instance to segregate and renounce jurisdiction over all issues of contract interpretation and validity which involve questions arguably subject to the Act. Often these questions are inextricably intermingled with others. In other situations courts and arbitrators cannot, in ruling on issues of contract enforcement, avoid passing on the legality of activities arguably subject to the Act, unless they are to create a no-man's land.

Even if courts and arbitrators could accomplish this feat of segregation, and even if they renounced jurisdiction over all issues arguably subject to the Act, all possibility of conflict between the Board and courts and arbitrators would

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[a] In *Ryan Aeronautical Co.* v. *U.A.W., Local 506*, 179 F. Supp. 1 (S.D. Cal. 1959) the court, ruling in favor of concurrent jurisdiction, stated (p. 4):

> "It is apparent that many breaches of labor contracts also constitute unfair labor practices; so that, if plaintiff's contention were adopted, it would virtually abrogate the arbitration provisions contained in a majority of the contracts."

The Massachusetts Supreme Judicial Court similarly observed, in *Post Publishing Co.* v. *Cort*, 334 Mass. 199, 134 N.E. 2d 431, 435 (1956):

> "We recognize that, as a practical matter, the national labor relations board cannot undertake to determine everything which is sought to be brought before it, and declines to review many cases. 69 Harv. L. Rev. 725, 729 et seq. We cannot believe that Congress intended to create a no-man's land where voluntary arbitration is barred and the national labor relations board may be too overburdened to enter."

However, the Massachusetts court did not find it necessary to decide the issue of concurrent jurisdiction.

not be eliminated. For the Board finds it necessary, in many instances, to rule on the validity and interpretation of contracts, just as courts and arbitrators find it necessary, in some situations, to rule on the legal consequences of activities arguably subject to the Act.

Concurrent jurisdiction between courts and arbitrators, on the one hand, and the Board, on the other, will no doubt produce some conflict and diversity of ruling. However, concurrent jurisdiction is not only unavoidable but will augment existing possibilities of conflict to only a minor degree. And, since federal law governs the interpretation both of the Act and of collective bargaining agreements, conflicts can ultimately be resolved by this Court.

We proceed to the elaboration of these points.

A. Courts and Arbitrators Must Rule on the Legal Consequences of Activities Arguably Subject to the Act.

1. *Areas of overlap.*—The obstacles to any doctrine excluding courts and arbitrators from adjudicating contractual issues if they involve activities arguably subject to the Act become apparent when we consider some of the areas of overlap, and how the courts, arbitrators, and the Board have handled the problems of exclusive or concurrent jurisdiction to which these areas of overlap give rise.

(a). *The union's status as bargaining representative.*—As Justice Frankfurter noted in his dissent in *Lincoln Mills*, 353 U.S. at 482-483, the validity of the collective bargaining agreement depends on whether the union negotiating it was the legal collective bargaining representative. That is a question within the jurisdiction of the NLRB. *La Crosse Telephone Corp.* v. *Wisconsin Employ. Rel. Bd.*, 336 U.S. 18. To hold that the courts, therefore, may not

enforce collective bargaining agreements would, however, render § 301(a) a nullity.[7]

When, on the other hand, the Board orders an employer to withdraw recognition from a union, and to cease giving effect to a contract with it, the Board's order is of course binding on the courts, and a suit to enforce the contract may not thereafter be maintained. *Duralite Co. v. Local 485, IUE*, 50 LRRM 2556 (E.D.N.Y., June 22, 1962).

(b). *Discharge of employees.*—Virtually every collective bargaining agreement prohibits discharge except for cause, and many, like the agreement in the present case, explicitly paraphrase the ban in § 8(a)~~(3)~~ against discrimination because of union membership or activity.[8] These clauses are the source of a large volume of arbitration.[9]

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[7] In *Industrial Workers, Local 286 v. Star Products Co.*, 41 LRRM 2840 (Ill. App. 1958) the court ruled that it had no jurisdiction over a suit for a declaratory judgment as to the validity of a collective bargaining agreement, because the contract's validity involved legal issues under the National Labor Relations Act. The court said (41 LRRM at 2841):

> "Specifically, the court would have been required, by plaintiff's suit, to apply the foregoing sections of the act to the question whether the plaintiff union, at the time the alleged contract was entered into, represented in fact a majority of defendant's employees in an appropriate unit for collective bargaining purposes. Unless the court so held, it could not adjudge, as plaintiff prayed, that the contract was 'valid from its inception.' "

[8] Dunau estimates that "probably more than half of the agreements contain a provision of the latter sort. *Op. cit. supra* at 68." And see Note, Jurisdiction of Arbitrators and State Courts Over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice, 69 Harv. L. Rev. 725 (1956).

[9] The Labor Arbitration Report series, published by the Bureau of National Affairs (which starts in 1946, but reports only a small fraction of all arbitration awards), lists in the Index-Digest some

Where, as in the present case, the union relies on a contractual provision which paraphrases the Act, the issues under the contract and under the Act are precisely the same. Even when the contract contains only the more general clause forbidding discharge or other disciplinary action except for "cause" arbitrators' decisions are likely to involve issues "arguably subject to § 7 or § 8 of the Act." Since no arbitrator will uphold, as for "cause," a discharge on account of union membership or other activity protected by the Act, arbitrators frequently must determine whether activities claimed to justify discharge are, on the one hand, legitimate activities protected by the Act, or are, on the other hand, misconduct constituting cause for discharge. This is exactly the criterion the Board uses in ruling on the validity of challenged discharges or other disciplinary action: indeed § 10(c) of the Act forbids the Board to order the reinstatement or payment of back pay to an employee "suspended or discharged for cause."[9]

This overlap of Board and arbitral functions, as well as the Board's policy toward arbitration of these issues, is illustrated by *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

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75 cases under the topic, "Discharge and Discipline—Union activities" (Sec. 118-664). Many other cases are found in Section 4 "Interference with Organization and Discrimination against Union Members."

[9] The House Conference Report on Taft-Hartley states:

"Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the act and are subject to discharge without right of reinstatement. The right of the employer to discharge an employee for any such reason is protected in specific terms in section 10(c)." (H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. p. 59).

As part of the settlement of a strike the company and the union agreed to arbitrate the reinstatement of four strikers whom the company asserted had engaged in misconduct during the strike. The arbitration award was in favor of the company, and the four employees then filed a charge of illegal discrimination in violation of § 8(a)(3) and (1) of the Act. The Board dismissed the complaint. It declared that it was not bound, "as a matter of law, by an arbitration award" (p. 1081), but that in its discretion it would recognize it.[11] The Board said (p. 1082):

> "In summary, the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances *we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of of the arbitrators' award.*" (Italics added.)

The discharge or other discipline of employees for conduct during a strike gives rise to disputes involving large numbers of employees, and the resolution of these disputes by arbitration unquestionably relieves the Board of a con-

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[11] Section (10(a) of the National Labor Relations Act provides:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise • • •."

Literally this provision states only that the power of the NLRB to remedy an unfair labor practice is not affected by the existence of an arbitral or judicial remedy. The Board has gone beyond that, and has consistently held that it is not bound, as a matter of law, by an arbitration award. *Monsanto Chemical Company*, 97 NLRB 517, *enforcement granted*, 205 F. 2d 763 (8th Cir. 1953). And see *Lucas Flour*, 369 U.S. 95, 101, n.9).

siderable volume of work. For example, 226 employees were discharged for alleged misconduct during the 1955 Southern Bell strike, and the arbitration of these discharges occupied the time of several attorneys and arbitrators for many weeks. Had the Board handled these discharges as unfair labor practices, their adjudication would have employed many more people for much longer. See, *e.g., Kohler Co.*, 128 NLRB 1062, *enf'd in part and set aside in part*, 49 LRRM 2485 (D.C. Cir. 1962), *cert. denied*, 30 U.S.L. Week 3375.

Any proposition that the jurisdiction of the Board in these situations is exclusive would be startling. Only last spring this Court enforced an arbitration award as to the reinstatement of strikers, and the only issue it perceived was whether the strike settlement agreement was so informal as not to be a "contract" within § 301. *RCIA, Local Unions Nos. 128 and 633 v. Lion Dry Goods*, 369 U.S. 17, discussed *supra* p. 14.[13]

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[12] See Dunau, *op. cit. supra* at 71.

[13] In *McAmis v. Panhandle Eastern Pipe Line Co.*, 273 S.W. 2d 789 (Mo. App. 1954), the contract contained both a clause prohibiting discrimination on account of union activity, and one prohibiting discharge "unjustly." An employee was discharged for upbraiding a fellow worker for crossing a picket line during a strike, and the union took the case to arbitration. The arbitration board held that the discharge violated both of the beforementioned contract clauses, and ordered reinstatement. The company refused to comply, on the ground that the asserted grievance alleged an unfair labor practice within the exclusive jurisdiction of the NLRB. The Missouri Court of Appeals sustained the award. It agreed that the issue of discharge for union activity was within the exclusive competence of the Board, but held that the question whether the employee was discharged "unjustly" was a separable issue, and properly for determination by the arbitration board. Surely this hair-splitting demonstrates its difficulty rather than its desirability.

(c). *The duty to bargain collectively.*—The employer's obligation under the Act to bargain collectively, and his obligations under the contract to deal with the union, are another area of major overlap.

When employees are represented by a union, it is a violation of the employer's obligation under § 8(a)(5) "to bargain collectively" for the employer to institute changes in wages, hours, or working conditions without first negotiating with the union. *NLRB* v. *Katz*, 369 U.S. 838. However, unilateral changes by an employer are also often challenged in arbitration or in the courts, as violative of the recognition or other clauses of the contract.[14]

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[14] See, e.g., two cases, discussed in Dunau, *op. cit. supra* at 56-58, which arose out of the refusal of employees to testify before a congressional committee.

In one case the company issued a policy statement that it would discharge employees refusing to testify. The union sued for a declaratory judgment, asserting that the unilateral promulgation of the policy was a violation of the recognition clause of the contract. The Court of Appeals for the District of Columbia Circuit dismissed the action, on the ground that the union's claim was that the company had committed an unfair labor practice by refusing to bargain, and was, "therefore, within the exclusive primary jurisdiction" of the NLRB. *United Elec. Workers* v. *General Elec. Co.*, 231 F. 2d. 259, *cert. denied*, 352 U.S. 872.

In the second case the company discharged two employees who refused to testify. The union took the case to arbitration, asserting both that the company had unilaterally changed the conditions of employment, in violation of the recognition clause, and that the discharges were not, in the language of the contract, for "proper cause." The arbitration board ordered reinstatement; the company refused to comply; and the union sued to enforce compliance. The district court dismissed, on the ground that the alleged refusal to bargain was the essence of the grievance, so that the matter was within the exclusive jurisdiction of the NLRB. (136 F. Supp. 31, D. Mass. 1955.) The Court of Appeals reversed. It said that the grievance rested on two grounds, i.e., the failure to consult the

Further, § 8(d) of the Act makes it a refusal to bargain for either party to a collective bargaining agreement to "terminate or modify such contract" unless certain prescribed notices are given and waiting periods observed. However, the question whether one party or the other has undertaken to "terminate or modify" may turn solely on the interpretation of the contract. In such a situation the Board has on occasion refused to entertain the dispute, and has left it for ultimate judicial adjudication, even though the dispute is not only "arguably" but clearly subject to § 8 of the Act. In dismissing a case of this sort the Board said, *United Telephone Company of the West*, 112 NLRB 779, 781 (1955):

> "The complaint alleges no violation of the Act other than the one arising out of the parties' conflicting contract interpretations. * * * [T]he Board does not ordinarily exercise its jurisdiction to settle such conflicts. As the Board has held for many years, with the approval of the courts: '. . . it will not effectuate the statutory policy . . . for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act.'"

The Board added:

> "[T]he Union's recourse in this situation was to exhaust the possibility of settling the overtime question

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union, and that the discharges were not for "proper cause"; that the latter ground was separable and involved no issues of NLRB preemption; and that it was therefore not necessary to decide the preemption issue presented by the first ground of the grievance. *United Electrical Workers, Local 259 v. Worthington Corp.*, 236 F. 2d. 364.

This latter case illustrates both the intermixing of contract and NLRA issues, and that issues may sometimes be deliberately phrased so as to create or avoid overlapping jurisdiction.

> by negotiation, and, failing such settlement, to seek judicial enforcement of its construction of the contract."

The problem is further complicated by the fact that a collective bargaining agreement may validly prescribe the procedures to be followed by an employer in changing the terms or conditions of employment, such as establishing or varying piece rates. See Dunau, *op. cit. supra* pp. 72-80; Cox and Dunlop, The Duty to Bargain Collectively During the Term of an Existing Agreement, 63 Harv. L. Rev. 1097, 1120-1125 (1950). In these situations whether there is a refusal to bargain in violation of the Act turns on whether there is a breach of the collective bargaining agreement. A court or arbitrator who finds that there is a breach of the agreement is of necessity also ruling that there is an unfair labor practice, while, conversely, if the NLRB undertakes to adjudicate the unfair labor practice charge, it must of necessity interpret the contract.[15]

Again, the employer's duty to bargain in good faith includes the duty to furnish to the union data needed by it for effective bargaining, and this duty—

> "continues through the life of the agreements so far as it is necessary to enable the parties to administer

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[15] After a full review of the problem, Dunau concludes (*op. cit. supra* at 79-80):

> "In short, no regulation of unilateral action during the term of an agreement can escape the dilemma that, if the regulation be by the NLRB, it will involve that body in the administration of agreements, and that, if the regulation be by court or arbitrator, it will involve them in determining as a contractual question the discharge of what is also a statutory obligation. Adjudication by either overlaps the function of the other."

See also Meltzer, *op. cit. supra*, 59 Col. L. Rev. at 282-283.

the contract and resolve grievances or disputes." *Sinclair Refining Co.* v. *NLRB* (5th Cir., July 26, 1962).

Whether a union is entitled to particular data requested for use in prosecuting a grievance may depend, however, on whether the grievance is cognizable under the contract, and the resolution of that issue may require determination of the merits of the dispute. As the Court of Appeals for the Fifth Circuit noted in the above case:

> "In unmistakable terms, then, the Board, in order to determine relevance and pertinency—and hence the amenability of such evidence to a coercive order to produce—had to determine the very issue in dispute."

In other words the Board first held that under the contract the union's grievance was meritorious, and then held that the employer was therefore under a statutory duty to supply the information requested by the union for use in prosecuting the grievance. On review the court held, in the first ruling of its kind, that the Board *must* in such a situation leave the question of the employer's duty to produce information to the determination of the arbitrator as a part of the arbitration proceeding.

Thus the court resolved that particular problem of overlap between Board and arbitrator in favor of exclusive jurisdiction for the latter. This decision is thus far unique, but the Board itself has usually, as the court noted, reached the same result in the exercise of an assumed discretion. A recent case of this sort is *Hercules Motor Corp.*, 136 NLRB No. 145 (May 2, 1962). There the union filed a grievance claiming that the company had violated the agreement in setting certain piece rates. The company rejected the grievance and the union, as a prelude to taking the matter to arbitration, asked that a union time study man be permitted to examine the company's data relating to the grievance, and that he be allowed in the plant to observe the operations involved. The company rejected these requests and sug-

gested that the union take that issue to arbitration also. Instead the union filed a charge of refusal to bargain. The Board dismissed the complaint. It said:

> "On its face, the contract provides machinery devised by the parties themselves for settling such a dispute. Yet, instead of exhausting this procedure and proceeding within the framework of its contract, the Union elected to file charges asking the Board to intervene and resolve the dispute. While, under Section 10(a) of the Act, the Board is not bound as a matter of law by private agreements, we are of the opinion that it would not effectuate the policies of the Act for us to thus intervene in the case."

Accord: Denver-Chicago Trucking Co., 132 NLRB No. 123 (1961); *Montgomery-Ward & Co., Inc.*, 137 NLRB No. 41 (June 2, 1962).[16] But *cf. General Electric Co.*, 137 NLRB No. 188 (July 31, 1962).

The employer's statutory duty to bargain collectively imposes also certain obligations to negotiate with the union in the event that a plant is shut down, or, in some circumstances, if a part of the operation is transferred to another plant, or contracted out. See, *e.g., Renton News Record*, 136 NLRB No. 55 (1962); *Town & Country Mfg. Co.*, 136 NLRB No. 111 (1962). Since collective bargaining agree-

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[16] Earlier Board decisions on the effect to be given to arbitration awards or to the availability of arbitration are reviewed in Dunau *op. cit. supra* at 59-64; and Note *op. cip. supra*, 69 Harv. L. Rev. at 731-736. The General Counsel likewise refuses to issue complaints regarding refusal-to-bargain disputes which have been submitted to arbitration, or which he considers could more appropriately be resolved by arbitration, under a collective barainging agreement. See, *e.g.*, G.C. Adm. Dec. No. SR-1292, May 16, 1962. (Charge of refusal to bargain. Layoffs resulting from plant removal submitted to arbitration.); G.C. Adm. Dec. No. SR-1353, May 29, 1961. (Charge of refusal to bargain, based on a refusal to furnish information for the processing of a grievanee.)

ments deal with these same subjects, the Board, an arbitrator, or the courts, may be called on to rule on the statutory or contractual rights of employees when a plant is shut down or a particular operation is transferred or contracted out, and the legal questions at issue in these proceedings may overlap or even be identical."

Other illustrations of the pervasiveness of the overlap between issues arising under collective bargaining agreements and those arguably subject to the Act are discussed *infra*, and they could be multiplied indefinitely. Indeed nearly any article of the standard collective bargaining agreement can give rise to questions "arguably subject to § 7 or § 8 of the Act."

Thus if the policies of the Congress to provide additional judicial remedies for the enforcement of collective bargaining agreements (§ 301(a)), and to encourage the settlement through arbitration of disputes over the application or interpretation of a collective bargaining agreement (§ 203(d)), are to be given effect, it is necessary that courts and arbitrators continue to exercise jurisdiction over issues of contractual interpretation, even where they involve issues arguably subject to the Act. In *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, the Court said (p. 567):

[fn] The Court of Appeals for the Tenth Circuit held that the courts had jurisdiction in a suit challenging a leasing arrangement as in violation of the collective bargaining agreement "even though the aggrieved [sic] incident or act can be said to be an unfair labor practice and within the jurisdiction of the Board . . ." *Local 1264, United Steelworkers* v. *New Park Mining Co.*, 273 F. 2d 352, 358, cited by this Court in *Lucas Flour*, 369 U.S. 95, 101, n.9. *Accord: In re Columbia Broadcasting System*, 205 N.Y.S. 2d 85 (N.Y. Sup. Ct. 1960). *Cf. Locals 231 and 243, ILGWU* v. *Beauty Bilt Lingerie*, 48 LRRM 2995 (S.D.N.Y. 1961).

> "Arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement."

While this statement was not made in the context of the issue presented in this case, it was made in a somewhat related context: the Court was admonishing the judiciary against narrowing the reach of arbitration by excluding grievances not deemed meritorious.

2. *Court suits and arbitration indistinguishable as respects preemption.*—It is true that the present case does not involve arbitration, but a state court suit for damages, so that the statutory policy, and other policy considerations, which support encouragement of the arbitral remedy, are not directly at stake. However, a ruling in this case in favor of exclusive Board jurisdiction will likewise limit the *scope* of arbitration, unless the Court holds, in this case or another, that the Board's jurisdiction precludes concurrent jurisdiction by courts but not by arbitrators.

Judge Magruder has suggested that, "[w]ith respect to arbitrators, as distinguished from courts, a narrower position concerning the application of the preemption doctrine is possible." *United Electrical Workers, Local 259* v. *Worthington Corp.*, 236 F. 2d 364, 367 (1st Cir. 1956). And see Note, Jurisdiction of Arbitrators and State Courts Over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice, 69 Harv. L. Rev. 725, 736-737 (1956).

With all deference to the distinguished jurist, we submit, however, that such a position is not really "possible." Nothing in the statutory language confers concurrent jurisdiction upon arbitrators while withholding it from courts. There is likewise no basis in the legislative history for imputing to Congress any such preference for arbitral over judicial proceedings.

As already noted, Congress did articulate a policy in favor of final and binding arbitration of contract disputes. At the same time, however, by § 301(a) it made collective bargaining agreements legally binding as a matter of federal law and provided federal judicial sanctions for their breach. *Lincoln Mills*. Section 301(b) makes it clear that Congress had damage suits in mind as a sanction. While the Court said in *Lincoln Mills*, 353 U.S. at 458, "we see no reason for restricting § 301(a) to damage suits," and held § 301(a) to extend also to suits for specific performance of an agreement to arbitrate, there can be no doubt that the primary purpose of Congress in enacting § 301 was to facilitate damage suits against unions. See the legislative history set forth in *Dowd Box*, 368 U.S. at 508-513.[18]

As far as state court suits are concerned, this Court declared in *Dowd Box*, 368 U.S. at 509, that "* * * Congress expressly intended not to encroach upon the existing jurisdiction of the state courts." Here again there can be no doubt that it was state court damage suits, rather than suits to compel arbitration, that Congress was concerned to preserve. When Congress decided not to make the breach of a collective bargaining agreement an unfair labor practice, but instead to leave the enforcement of collective bargaining agreements "to the normal processes of the law" (H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42) those processes, as far as the states were concerned, were primarily damage suits and not enforcement of agreements to arbitrate. At that time many states still followed the

[18] "The pertinent legislative history suggests that the primary objective of Congress was to secure increased union compliance with no-strike clauses by facilitating the recovery of damages for the breach of such damages." Meltzer, The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: II, 59 Col. L. Rev. 269, 280-281 (1959).

common law rule against enforcement of executory agreements to arbitrate. See *Lincoln Mills*, 253 U.S. at 456.

Admittedly "the intent of Congress," which controls on questions of preemption by federal statutes, is often a constructive rather than an actual intent. More often than not the role of the Court is to determine what Congress would have intended had it foreseen the problem, rather than what Congress actually did intend. *Cf. Garmon*, 259 U.S. at 240-241. However that may be, it is, we submit, impossible to impute to the 80th Congress the intent, constructive or actual, to give preference as respects preemption to arbitration over damage suits.

3. *Intermixture of contractual and NLRA issues.*—Apart from the fact that judicial and arbitral jurisdiction would be drastically curtailed by any rule excluding issues arguably subject to the Act, it would be exceedingly difficult for courts and arbitrators to avoid trenching upon these issues. Dunau, *op. cit. supra*, points out (p. 58):

> "Thus a contract violation may cover the same ground as an unfair labor practice or it may go beyond it. The two do not necessarily involve identical considerations in determining either the merits of the dispute or the relief to be granted. They may overlap but not fully. If adjudication by a judge or arbitrator were to be wholly excluded in such a situation, no tribunal would exist to enforce that part of the bargain which goes beyond the NLRA but which is integrally related to that part of the bargain which duplicates the NLRA. It would therefore seem to follow that the parties cannot create an enforceable contractual obligation to augment the statutory protection conferred by the NLRA even though such enhancement is not offensive to the NLRA. On the other hand, if court or arbitrator may adjudicate that part of the dispute which is not within the NLRB's jurisdiction, a single transaction would be bifurcated between two tribunals, neither empowered to resolve the matter fully and each perhaps pro-

ceding from diverse assumptions. Neither total nor partial exclusion of court or arbitrator seems therefore satisfactory. This suggests the conclusion that neither court nor arbitrator should be excluded at all."

Occasionally a court has attempted to segregate out and renounce jurisdiction over issues which are arguably subject to the Act. The Court of Appeals for the First Circuit held discharges arbitrable insofar as the grievances rested on a contract clause prohibiting discharge save for "proper cause," but declared that it need not decide whether the grievances were arbitrable insofar as they rested on the recognition clause of the contract.[19] The latter clause, in the court's view, presented a problem of preemption because of its interrelation with the employer's duty under the Act to bargain collectively. In sustaining an arbitration award directing the reinstatement of an employee discharged for asserted misconduct during a strike, a Missouri court of appeals held that the discharge was arbitrable insofar as the grievance rested on a contract clause prohibiting discharge "unjustly," but that it was not arbitrable insofar as it rested on a contract clause prohibiting discrimination on account of union activity.[20] Insofar as the grievance rested on the latter clause it presented, the court said, an issue within the exclusive competence of the NLRB.

These attempts at isolating and rejecting jurisdiction over issues arguably subject to the Act illustrate, we submit, the difficulty of such a course rather than its feasibility.[21] The arbitration award enforced by the Missouri court dealt with a dispute which clearly was subject to the Act, i.e., whether the employee was discharged for protected

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[19] *United Electrical Workers, Local 259* v. *Worthington Corp.*, discussed at greater length *supra* p. 32, note 14.

[20] *McAmis* v. *Panhandle Eastern Pipe Line Co.*, discussed *supra* p. 31, note 13.

[21] See also Meltzer, *op. cit. supra*, at 288-289.

strike activity, in which event his discharge was in violation of § 8(a)(3) and (1) of the Act, or for unprotected misconduct. Whether such a dispute is within the exclusive primary jurisdiction of the federal Board, or whether courts and arbitrators may also assume jurisdiction under a collective bargaining agreement, can hardly turn on whether the union relies on a specific clause of the contract which paraphrases the Act or on some more general clause.

4. *Courts cannot avoid issues subject to the Act.*—However, the decisive consideration against exclusive Board jurisdiction over all issues arguably subject to the Act, even if they arise under a collective bargaining agreement, is not that such a doctrine would drastically curtail the reach of arbitration and of judicial enforcement of contracts, or that it would be difficult for courts or arbitrators to isolate these issues from other contractual issues, but that sometimes these issues arise in such a way that they cannot come before the Board, so that courts or arbitrators must decide them or a no man's land will result.

Lucas Flour, discussed *supra* pp. 14-18, was a case of that sort. The collective bargaining agreement in that case provided for the final and binding arbitration of discharges, but did not contain a no-strike clause. The company discharged an employee, assertedly for unsatisfactory work, and the union went on strike. The company sued for damages for breach of contract. The question before the courts was whether the strike was in violation of the contract. If, as the union contended, the strike was not in violation of the contract, it was protected activity under the federal Act: hence the litigation involved activities arguably subject to § 7 or § 8 of the Act. (See the dissenting opinion in *In re Green*, quoted *supra* p. 19.)

However, as this case arose, there was no way for this issue under the Act to be presented to the NLRB, because

there was no claim that either the employer or the union had committed an unfair labor practice. If the employer had discharged the strikers, instead of suing for damages, then the strikers or the union could have filed with the Board a charge of violation of § 8(a)(3) and (1), and, assuming that the General Counsel issued a complaint, the Board would have been called upon to rule, as it has in many similar cases, on whether the strike was protected activity under the Act, or misconduct outside the Act's protection. The ultimate issue for the Board, as for the courts, would have been whether the strike was in violation of the contract. In other similar cases the Board has held that a strike is a violation of the contract, and hence unprotected.[22] But there was no way that either of the parties could have presented the issue to the Board in *Lucas Flour*. Thus

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[22] In *Lucas Flour* this Court cited some of these Board decisions, as well as court decisions in breach of contract cases, in support of its ruling that the strike was a violation of the contract. The leading Board case, which the Court cited, is *W. L. Mead, Inc.*, 113 NLRB 1040. In that case the employer discharged striking employees, and a complaint issued under § 8(a)(1) and (3) of the Act. The Board held that the strike was in violation of the contract, that it was therefore not protected by the Act, and that the discharge of the strikers was, accordingly, not in violation of the Act. The Court of Appeals for the First Circuit, as this Court also noted, subsequently ruled the same way in a case arising out of the same strike, in affirming a judgment for damages against the union for breach of contract. (On this occasion Judge Magruder failed to note that the Court was deciding a dispute arguably subject to the Act.) *Local 25, Teamsters Union* v. *Mead, Inc.*, 230 F. 2d 576. Besides the *Mead* decisions, in *Lucas Flour* the Court cited two other court decisions in damage suits in support of the rule of contract construction it adopted, *United Construction Workers* v. *Haislip Baking Co.*, 223 F. 2d 589 (4th Cir.), and *Lewis* v. *Benedict Coal Corp.*, 259 F. 2d 346, *modified and affirmed*, 361 U.S. 459; and two decisions in unfair labor practice cases, *NLRB* v. *Dorsey Trailers, Inc.*, 179 F. 2d (5th Cir.), and *NLRB* v. *Sunset Materials*, 211 F. 2d 224 (9th Cir.).

if this Court had upheld the claim of preemption in *Lucas Flour*, the consequence would have been to deny to the company any forum for the adjudication of its claim of breach of contract.

When, as in the present case, the conduct alleged to constitute a breach of contract would also constitute an unfair labor practice, the complainant has available a choice of remedies of a sort. Even then it is a limited choice, because when a charge is filed under the Labor Act the General Counsel of the Board has absolute and unreviewable discretion as to whether to issue a complaint.[7] However, even this degree of choice of remedies is lacking in situations like *Lucas Flour* where the conduct asserted to consti-

[7] The role of the General Counsel is correctly described in *Ohio Valley Builders Exchange* v. *Carpenters*, 50 LRRM 2572, 2574 (Ohio Ct. of Common Pls. 1962):

> "General Counsel's authority in this respect is somewhat similar to the authority of a Prosecuting Attorney in reference to filing or not filing an information in a criminal case, except nothing can be done about it if General Counsel and his Regional Director refuse to file a complaint before the Board.
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> "There is a right of appeal from a hearing and judgment on the merits and issues by the National Labor Relations Board to the Federal Courts. There is no appeal to a court of law from the refusal of the General Counsel of the National Labor Relations Board to file a complaint before that Board. The General Counsel is an administrative officer, not a judicial officer.
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> "The issues in the instant case have not been determined by a judicial agency and, therefore, the plaintiff has not had a judicial determination of the issues in question on their merits; it has not had its day in court; it has not had a right to examine and cross examine the witness; it has had no right of appeal from the ruling of the General Counsel; the issues raised by the plaintiff in its petition are not res judicata."

tute a breach of contract is not, in any event, an unfair labor practice, though it may be protected under the Act. Any application of the *Garmon* doctrine of preemption in these situations would leave the complainant remediless.

Another situation where an issue arguably subject to the Act is determinative of a breach of contract action, and there is no way of getting a Board decision on the issue, is posed by Feldesman, *op. cit. supra*. After referring to *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, he states:

> "There, in rough summary, the Supreme Court held that, in spite of an ordinary no-strike provision in a labor agreement, there is no waiver of the right to strike against substantial employer unfair labor practices, and a work stoppage in such circumstances is a protected concerted activity. Now let us assume that a strike has been called by a contracting union despite the existence of the usual no-strike clause; the employer brings suit against the union under 301 for money damages; and the union thereafter defends the action, whether instituted in a Federal or State court, on the ground that the employer had committed egregious unfair labor practices and the union consequently struck to protest and gain relief from them. Does the Court have jurisdiction or is the matter within the exclusive competence of the Board? Note that to resolve the principal issue relating to the union's breach of contract, the Court must presumably first determine if the employer engaged in unfair labor practices of moment which preceded the strike."[24]

Yet another such situation is illustrated by *Local 24, Teamsters Union* v. *Oliver*, 358 U.S. 283, 362 U.S. 605. There a union member covered by a collective bargaining agreement, joined by employers who were parties to it,

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[24] Meltzer, *op. cit. supra*, at 289-291, likewise discusses *Mastro Plastics* in arguing for concurrent jurisdiction.

brought suit against the unions to enjoin the carrying out of certain provisions of the contract, on the ground that they violated the Ohio anti-trust laws. The state courts held for the plaintiff, but this Court sustained the unions' contention that the National Labor Relations Act protected this right to enter into the contractual provisions in question. This Court said that the state anti-trust law could not

> "be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain." 358 U.S. at 295.

Probably the commonest situation which confronts courts and arbitrators with the necessity of determining issues subject to the Act is where it urged as a defense that a contract is invalid, in whole or in part, under the Act or policies of the Board; and often the posture of the case is such that that issue cannot be presented to the Board. Needless to say, the courts regularly rule on the sufficiency of these defenses.[25] Judicial rulings in these

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[25] See, *e.g.*, *Local 598, Plumbers & Steamfitters Union* v. *Dillion*, 255 F. 2d 820 (9th Cir. 1958) (suit by employer for damages for breach of contract; defense that contract was illegal; held that hiring hall and union security provisions were illegal and an unfair labor practice under NLRA, but were severable from remainder of contract); *Iob* v. *Los Angeles Brewing Co.*, 183 F. 2d 398 (9th Cir. 1950) (NLRB ruling that contract did not bar an election, because petition timely filed, held not a holding that contract was invalid); *Local 28, IBEW* v. *Md. Chapter, NECA*, 48 LRRM 2031, 42 LC ¶ 16,946 (D. Md. April 24, 1961) (declaratory judgment that union has validly terminated contract, including complying with notice requirements of § 8(d)); *Local 1055, IBEW* v. *Gulf Power Co.*, 175 F. Supp 315 (N.D. Fla. 1959) (contract recognizing union as bargaining representative for supervisors held not invalid under Act); *Lewis* v. *Kerns*, 175 F. Supp. 115 (S.D. Ind. 1959) (contract not invalid because of union's failure to comply

cases have inevitably resulted in some conflict between court and Board doctrine. For example, the Board has over the years tended to regard an invalid union security clause as invalidating a contract for all purposes,[25] while the Court of Appeals for the Ninth Circuit has reached the opposite conclusion.[26] Again, in *Textile Workers, UTW* v. *Textile Workers, TWUA*, 258 F. 2d 743 (7th Cir. 1958) the court enforced a no-raiding agreement between unions despite the Board's position that enforcement of the agreement was contrary to the policy of the Act.[27] The opposite view was taken, and the Board's position was sustained, in *Doll & Toy Workers* v. *Metal Polishers*, 180 F. Supp. 280 (S. D. Cal. 1960). In general, however, the courts have followed

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with § 9(f), (g) and (h) of Taft-Hartley); *Locals 231 and 243, ILGWU* v. *Beauty Bilt Lingerie*, 48 LRRM 2995 (S.D.N.Y. 1961) (subcontracting clause not invalid under § 8(e) or § 302); *Independent Union* v. *Proctor & Gamble*, 49 LRRM 2703 (E.D.N.Y., February 21, 1962) (failure to give notice required by § 8(d) does not extend contract); *United Public Workers* v. *University of Chicago*, 23 LRRM 2352, 16 LC ¶ 64,988 (Ill. Cir. Ct. 1949) (same); *Aaronson Bros. Paper Corp.* v. *Fishko*, 144 N.Y.S. 2d 643 (N.Y. Sup. Ct. 1955), *aff'd*, 286 App. Div. 1009 (union security clause illegal under NLRA held severable); *Ebinger Baking Co.* v. *Bakery Drivers*, 48 LRRM 2274, 42 LC ¶ 16,992 (N.Y. Sup. Ct. 1961) (same).

[25] This doctrine of the Board was rejected by the Court in *NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71. Nevertheless the Board has continued to apply it automatically and broadly in holding that a contract containing a defective union security clause does not bar an election. See NLRB Annual Report, 1961, p. 44 *ff.*

[26] *Local 598, Plumbers & Steamfitters Union* v. *Dillion*, 255 F. 2d. 820.

[27] This case involved a more direct conflict between Board and court than a mere conflict in views as to the policy of the Act. The Board had ordered an election on petition of the defendant union, notwithstanding the no-raiding agreement, and the court thereafter ordered the union to withdraw the petition. A full account of this contretemps is given in Meltzer, *op. cit. supra* at 296-301.

established Board doctrine, just as this Court did in *Lucas Flour*, and certainly no intolerable conflict or confusion has resulted.

In adjudicating suits for breach or enforcement of a contract, the courts may likewise have to determine the effect to be given to orders of the NLRB. Thus in *Modine Mfg. Co.* v. *Machinists*, 216 F. 2d 326 (6th Cir. 1954) the Board had ordered an election under its "premature extension" rule during the life of a contract between the Machinists Union and the company. Another union—the Steelworkers—won the election and was certified, and the Machinists thereafter brought suit against the company to enforce the contract, and especially the dues check-off provision thereof. The court ruled for the company. It held that the certification of the Steelworkers Union by the Board rendered the recognition clause of the contract between the Machinists and the company inoperative, and that thereafter the contract had to be administered by the Steelworkers. *Accord, Kenin v. Warner Bros. Pictures, Inc.*, 188 F. Supp. 690 (S.D.N.Y. 1960). In *Retail Clerks* v. *Montgomery Ward*, 50 LRRM 2702 (N.D. Ill. 1962), the union, subsequent to decertification by the Board in a representation proceeding, brought suit to enforce the collective bargaining agreement, which by its terms had not yet expired. The NLRB intervened, and urged both that the court lacked jurisdiction and that the decertification terminated the rights of the union under the contract. The court rejected the former contention but sustained the latter. See also *Duralite Co.* v. *Local 485, IUE*, 50 LRRM 2556 (E.D.N.Y., June 22, 1962), dismissing a suit to enforce a contract because the Board had entered an order directing the employer to withdraw recognition from that union and to cease giving effect to the contract.[29]

[29] The decisions are uniform, on the other hand, that the courts do not have jurisdiction over a suit, even though based on a con-

There thus are innumerable situations in which the courts cannot, despite the Board's primary jurisdiction over unfair labor practice disputes, avoid determining in contract actions whether conduct is protected or prohibited under the act.[30]

B. The Board Finds It Necessary to Rule on the Validity and Interpretation of Contracts.

The reverse is likewise true. Even though the Congress decided not to make breach of contract an unfair labor practice, and to leave contract enforcement "to the usual processes of the law" (see *supra*, p. 23), the Board engages in a vast amount of contract interpretation.

Much of this contract interpretation is unavoidable.

Section 8(e), popularly known as the "hot cargo" provision, which was added to the Act in 1959, makes it an unfair labor practice for a union and an employer "to enter into any contract or agreement, express or implied," of the sort proscribed. In enforcing this provision the Board must of necessity rule on whether contracts have

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tract, involving the scope of a bargaining unit under a Board certification. "A union by contract with an employer cannot define the scope of its certification; that is the Board's function." *Local 1505, IBEW* v. *Lodge 1836, IAM*, 50 LRRM 2337, 2338 (1st Cir., June, 1962). *Accord, Carey* v. *Westinghouse Electric Corp.*, 50 LRRM 2740 (N.Y. Ct. App., July, 1962), *affirming* 49 LRRM 2225 (N.Y. App. Div., 1961); *Local 6, Chemical Workers* v. *Olin Mathieson Corp.*, 202 F. Supp. 363 (S.D. Ill. 1962). But *cf. Freight Drivers, Local 557, IBT* v. *Quinn Freight Lines*, 195 F. Supp. 180 (D. Mass. 1961).

[30] There are even occasional situations which do not involve the validity or interpretation of a collective bargaining agreement, but where the courts nevertheless find it necessary to interpret the National Labor Relations Act, despite the Board's primary jurisdiction. See, *e.g.*, *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62; *Hill* v. *Florida*, 325 U.S. 538.

been entered into and on their interpretation. See, *e.g.*, *Employing Lithographers of Greater Miami* v. *NLRB*, 301 F. 2d 20 (5th Cir. 1962) *enforcing* 130 NLRB 968 (1961).[31]

Although § 8(a)(3) and § 8(b)(2) do not explicitly provide, as does § 8(e), that the bare execution of a contract inconsistent with their provisions shall constitute an unfair labor practice, the Board has long held that it is an unfair labor practice to enter into a union security agreement not meeting the requirements of § 8(a)(3). See NLRB Annual Report, 1949, p. 85.

The Board likewise must sometimes consider and interpret collective bargaining agreement provisions in determining whether there has been a unilateral change in conditions of employment, and hence a refusal to bargain,[32] even though, as developed *supra* pp. 33-34, it sometimes declines to exercise jurisdiction in these situations in favor of arbitration or judicial proceedings.

The Board also frequently gets into the question of contract construction not directly but collaterally in unfair labor practice cases. Feldesman, *op. cit. supra*, gives one illustration:

> "For example, as in the *Mead* case, the Board may be called upon initially to decide whether a contract contains a no-strike obligation in order to reach the question whether the employer by terminating economic strikers has committed an unfair labor practice. For,

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[31] Even prior to the 1959 amendments the Board at times took the position that the bare execution of a hot cargo agreement was an unfair labor practice by the union; but this view was rejected by the Court in *Local 1976, United Bro. of Carpenters* v. *NLRB*, 357 U.S. 93, 108.

[32] See, *e.g.*, *Bethlehem Steel Co.*, 136 NLRB No. 135, 50 LRRM 1013 (1962).

as Hornbook law explains, although an economic strike is normally a protected concerted activity under Section 7 of the National Labor Relations Act, it loses that protection if in breach of contract; and while a discharge for engaging in protected concerted activity is an unfair labor practice under Section 8 of the Act, a separation for unprotected conduct is not."

The Board is as much if not more concerned with the execution, interpretation and validity of contracts in representation cases as in unfair labor practice cases. Its doctrines that a valid outstanding contract bars an election for a maximum of two years, but that the validity of the contract on its face may be challenged in a representation proceeding if the contract bar rule is invoked, ensure that contractual issues play a major rule in the determination of representation proceedings. See Annual Report, 1961, pps 39-52.

In short the Board, a the most cursory examination of its Annual Reports makes clear, is as much involved as the courts with issues of the interpretation and validity of collective bargaining agreements.

There thus is no way that courts and arbitrators can be excluded from considering in contract cases issues arguably subject to the Act, or that the Board can be excluded from considering a vast range of contractual issues.

It would be possible, and perhaps justifiable in abstract theory, for the Court to distinguish between situations where it is possible for the party raising the issue arguably subject to the Act to request the Board to determine it, and those where the issue arises in such a context that it cannot be presented to the Board. Such a distinction would, however, be itself a fruitful source of confusion and litigation, and a wide area of inevitable overlap between courts and arbitrators and the Board would still be left.

C. Concurrent Jurisdiction will Augment Disputes and Conflicts to Only a Minor Degree.

Concurrent judicial and arbitral jurisdiction over contractual issues which are arguably subject to the Act unquestionably will produce the "diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Garner* v. *Teamsters Union*, 346 U.S. 485, 490. We suggest, however, that such concurrent jurisdiction is not only unavoidable, as we have sought to show, but that it will augment existing possibilities for "diversities and conflicts" to only a minor degree.

1. The Board, arbitrators, and a majority of the courts, have, for the most part, proceeded all along on the basis of concurrent jurisdiction. While there has been some conflict of substantive doctrine, there does not appear to have been a great deal. Certainly there has been more diversity and conflict over the preemption issue itself than over the substantive question involved.

2. As this Court recognized in *Dowd Box*, 368 U.S. 502, 514, the possibility of conflict among state and federal courts is in any event inherent in the concurrent jurisdiction of state courts over suits on collective bargaining agreements. This Court said:

> "It is implicit in the choice Congress made that 'diversities and conflicts' may occur, no less among the courts of the eleven federal circuits, than among the courts of the several States, as there evolves in this field of labor management relations that body of federal common law of which *Lincoln Mills* spoke."

The overlap between the jurisdiction of the Board to prevent unfair labor practices under § 8(b)(4) and the jurisdiction of the courts over damage actions under § 303 like-

wise creates a likelihood of conflict—and some conflict has developed.[33]

3. Under this Court's holdings in *Lincoln Mills*, *Dowd Box* and *Lucas Flour*, "a single body of federal law" (369 U.S. at 104) will govern the interpretation of collective bargaining agreements no less than the interpretation of the Act.[34] Conflicting interpretations of the Act and of collective bargaining agreements which result from concurrent jurisdiction can, therefore, be resolved by this Court. As the Court said in *Dowd Box*, 368 U.S. at 514:

> "To resolve and accommodate such diversities and conflicts is one of the traditional functions of this Court."

4. The federal substantive law which will govern in suits on collective bargaining agreements will be derived in

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[33] Compare *NLRB* v. *Donna Artware, Inc.*, 198 F. 2d 645 (6th Cir.); *cert. denied*, 345 U.S. 906, with *Brick & Clay Workers* v. *Donna Artware, Inc.*, 198 F. 2d 637 (6th Cir.), *cert. denied*, 344 U.S. 897.

[34] Feldesman states:

> "Perhaps the most obvious interlacing between the two may be gleaned from the manner in which the Supreme Court in *Lucas Flour* arrived at the rule of substantive law that an exclusive, final and compulsory arbitration provision envisages as to disputes within its coverage an agreement not to strike. To formulate this doctrine of Federal law the Supreme Court relied upon Federal court precedents, including National Labor Relations Board court cases, and the Board's decision to like effect in *W. L. Mead, Inc.*, (113 NLRB 1040).
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> "There is thus reason to conclude that in piecing together the mosiac of National substantive law that is needed to implement 301, the Supreme Court—and lower Federal and State courts—will look to principles of labor contract law developed in the administration of the National Labor Relations Act. Nor, I suspect, will this be a one-way street. Doubtless Federal contract law evolved under 301 independently by the courts will also have a bearing upon the Board's disposition of cases within its competence to decide."

considerable part from provisions of the Labor Management Relations Act. In *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456-457, the Court said:

> "We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. . . . The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates."

The basic provisions of the National Labor Relations Act are, of course, § 7 and § 8. Surely it would be paradoxical to hold that these sections—which are a major source of the substantive federal law to be applied under § 301—at the same time operate to oust the courts of jurisdiction over all issues arguably within the scope of these sections.

CONCLUSION

For the reasons stated, it is respectfully urged that the judgment of the court below should be reversed.

Respectfully submitted,

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